

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DONSON BREWER,

Plaintiff and Appellant,

v.

CALIFORNIA HIGH REACH & EQUIPMENT
RENTAL, INC.,

Defendant and Respondent.

F053991

(Super. Ct. No. 06-CECG00495)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Magill Law Offices and Timothy V. Magill for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Todd W. Baxter and Scott M. Reddie for Defendant and Respondent.

-ooOoo-

This is an appeal from judgment after a defense verdict in a personal injury case. Plaintiff and appellant Donson Brewer contends trial court error and misconduct of defense counsel, either jointly or separately, resulted in a prejudicially unfair trial. We will conclude many of the claims of error were waived by failure to object or request an admonition. In light of the jury's response on the special verdict form, none of the remaining claims demonstrate prejudicial error. Accordingly, we will affirm the judgment.

Facts and Procedural History

Appellant was a heavy equipment operator for Span Construction (Span). The present case arose out of appellant's activities as a hydraulic lift operator. Span rented the lift, along with other equipment, from defendant and respondent California High Reach & Equipment Rental, Inc.

The lift was a large, rough-terrain model used at construction sites. It had a hydraulically telescoping boom attached at the rear of the chassis, extending forward on the driver's right side. At the front of the boom a coupling permitted the use of various attachments, including a forklift and a man-lift cage.

The forklift attachment is composed of two horizontal pallet forks and a rear steel wall (called the "mast"), against which the load rests when the forks are tilted back for transporting a load. Steel flanges protrude from the rear of the mast for attaching the forklift to the telescoping boom. Two of the flanges have C-shaped openings facing the ground. The attachment is connected to the telescoping boom by hooking these flanges over steel pegs protruding from the sides of the head of the telescoping boom. When the attachment is level with the ground, gravity holds the flanges onto the pegs and, therefore, the forklift attachment onto the boom. The forklift attachment is to be further secured by insertion of single steel flange into the opening between two flanges mounted on the boom head and attached to a hydraulic shaft that permits the operator to control the tilt of the fork platform. The attachment flange and the two boom head

flanges are composed of vertical plates with a circular hole through the plates. When the flanges are properly aligned, a large steel pin is passed through the three holes to secure the attachment to the boom. The large pin is called the “quick switch pin.” The quick switch pin, in turn, has a hole through it, into which a smaller pin is to be inserted to keep the quick switch pin from backing out of its proper place through the holes in the three flanges. This smaller “lock” pin is central to appellant’s case.

When the hydraulic lift was delivered to Span’s worksite, the lock pin was not the pin provided by the lift manufacturer and was not an authorized replacement pin. The original pin had an automatic locking mechanism on its end to secure it in place once inserted in the quick switch pin; the replacement pin did not have a feature to secure it in the quick switch pin.

The lift had been delivered to the Span worksite by respondent about a month before the date of appellant’s injury. During the intervening time, the attachments had been switched at least once by Span’s employees. In addition, appellant had switched the attachments on a lift on one occasion but, because there were two units of the same model on the site, appellant was not sure which unit he had changed. Appellant was not assigned a particular unit and might operate either one on any particular day.

On February 14, 2005, appellant was operating a lift equipped with the fork attachment. His task required him to frequently adjust the spread between the forks, and he already had done that several times on the day in question. In order to make the adjustment, appellant hydraulically tilted the fork attachment forward to make the forks easier to slide. He dismounted and walked to the front of the machine and into the gap between the forks. As he was pushing one of the forks outward, the fork assembly, weighing almost 600 pounds, fell on him. He was pinned to the ground until other workers freed him. Appellant was taken by ambulance to the hospital. He suffered soft tissue injury but no broken bones or damage to internal organs. He was treated and

released. Subsequently, appellant received outpatient medical care and physical therapy.

Appellant sued respondent for damages. Also named as a defendant was JLG Industries, Inc. (JLG), the manufacturer of the lift. Summary judgment subsequently was granted in favor of JLG, and the matter went to trial against respondent only. After a lengthy trial, the jury returned a special verdict finding that respondent was negligent but that its negligence was not a substantial factor in causing appellant's injury. Appellant's motion for new trial was denied and judgment was entered against appellant.

Appellant filed a timely notice of appeal.

Discussion

A. Claim of Instructional Error

1. Additional facts.

The trial court instructed the jury that appellant contended respondent and Span were both negligent and that the conduct of each was a substantial factor in causing harm to appellant. The court also instructed that respondent contended appellant's harm was caused in whole or in part by appellant's own negligence. Using Judicial Council of California Civil Jury Instructions CACI No. 401, the court instructed that "Negligence is the failure to use reasonable care to prevent harm to oneself or to others." The court gave several additional general instructions related to negligence (CACI Nos. 406, 411, and 415) before turning to the issue pertinent to this appeal, negligence per se.

Using various standards of the American Society of Mechanical Engineers and provisions of the California Code of Regulations, the court gave the following pattern instruction, derived from CACI No. 418, for each standard or regulation, naming the person or entity whose conduct was addressed by the standard or regulation. Thus, the court began with eight provisions applicable to respondent. In each instance the court

began: “As to CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC.: [¶] [The standard or regulation] states in pertinent part as follows: [¶] [Regulatory language.] [¶] If you decide [¶] 1. That CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. violated this law, and [¶] 2. That the violation was a substantial factor in bringing about the harm. [¶] Then you must find that CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. was negligent. [¶] If you find that CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. did not violate this law or that the violation was not a substantial factor in bringing about the harm, then you must still decide whether CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. was negligent in light of the other instructions.”

The court then gave the same instruction, modified to apply to Span, concerning five regulatory provisions. Finally, the court gave the same instruction, modified to apply to appellant, concerning eight regulatory provisions.

Immediately following this series of instructions, the court gave an instruction based on CACI No. 431 (causation: multiple causes): “A person or entity’s negligence may combine with another factor to cause harm. If you find that person or entity’s negligence was a substantial factor in causing DONSON BREWER’s harm, then CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. is responsible for the harm. CALIFORNIA HIGH REACH & EQUIPMENT RENTAL, INC. cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing DONSON BREWER’s harm.”

The special verdict form asked the jury, first, whether respondent was negligent. After this and each following question, the form told the jury to answer the next question only if it had answered “yes” to the present question. The next questions asked whether respondent’s negligence was a substantial factor in causing harm to appellant; the amount of appellant’s total damages; whether appellant was negligent; whether appellant’s negligence was a substantial factor in causing his harm; whether Span was

negligent; whether Span's negligence was a substantial factor in causing harm to appellant; and, finally, the percentage of responsibility that should be assigned to respondent, Span, and appellant.

The jury answered the first question by finding that respondent was negligent. It answered the second question by finding respondent's negligence was not a substantial factor in causing appellant's harm. In accordance with the form's directions, the jury proceeded no further and returned the verdict.

2. Appellant's contention.

Appellant argues at length that the court erred, in the portions concerning appellant's possible negligence per se, by refusing to instruct with the following italicized language, included in CACI No. 418 as a case-specific option: "If you find that [name] did not violate this law or that the violation was not a substantial factor in bringing about the harm [*or if you find the violation was excused*], then you must still decide whether [name] was negligent in light of the other instructions." He also contends the court was required to give an instruction based on CACI No. 420, describing acceptable excuses for violation of law by the party.¹

Appellant contends that, taken in context (see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 579), the omission of these instructions "allowed the jury to believe that Appellant's contributory negligence subsumed and overrode the negligence of Respondent which was not a substantial factor in causing harm to him. [The instructions as given led the jury to believe] [i]t was Mr. Brewer's own conduct that caused all of his harm."

¹ Appellant presented extensive evidence that he suffered from a learning disability that made it difficult or impossible for him to learn about the safe operation of the lift by reading the employer's and the manufacturer's safety and operation manuals. He contends these limitations excused his noncompliance with any otherwise applicable regulations.

3. Discussion.

We doubt the inherent logic of appellant's contention regardless of the jury's verdict but, in light of the actual verdict in this case, the argument is unavailing. In this case, the jury did not reach the point where it was required to evaluate appellant's exercise of reasonable care in any way, and it was not called upon to determine whether appellant's actions were a substantial factor in causing his own injury. Once the jury determined that respondent's actions were not a substantial factor in appellant's injury, that determination rendered it wholly irrelevant whether appellant's conduct violated any regulatory provision, whether any such violations were excused, or whether, indeed, appellant was wholly blameless.

Appellant seeks to avoid the fact that the jury never reached the questions addressed by the omitted instructions by concluding his argument as follows: "This [i.e., his prejudice argument] is buttressed by the fact that there is no evidence to support the jury's finding that the negligence of Respondent was anything other than a substantial factor in causing harm. There was no contrary causation evidence in this case." We take this to mean that the verdict is inexplicable except by positing that the jury ignored the plain wording of the special verdict form. (Appellant's reply brief says the verdict made it "clear that the jury totally ignored the law on substantial factor and concurrent causes.")

There is, however, no need for such speculation, for ample evidence supports a straightforward reading of the verdict: Photographs admitted into evidence show that the quick switch pin was still partially inserted into the flange on the boom head after the accident. Respondent's engineer expert testified the attachment flange could not come loose if the quick switch pin was even partially engaged. He said, however, that the attachment could be affixed to the boom head by the shoulder, or C-shaped, brackets.

Such attachment would be stable until a tipping point was reached, then the attachment would fall forward and drop from the boom head. This configuration, the expert testified, would result from improperly reinserting the quick switch pin when the attachment was changed, so that the pin did not pass through the attachment flange. Instead, the quick switch pin would have blocked the mast flange from seating in its proper location. The evidence was unequivocal that a Span employee had changed the attachment at least once after the lift was delivered by respondent. If the quick switch pin had not been properly reinserted, the failure of respondent to use an approved lock pin, while a negligent violation of regulatory provisions, would not have been even a partial cause of the attachment falling off.² Thus, on this view of the evidence, the jury would never have needed to reach the question whether appellant or some other Span employee had been negligent, since respondent was not, in this view, responsible for the attachment falling off.

In summary, we conclude that even if the evidence supported instructing the jury with CACI No. 420 and the augmented version of CACI No. 418 (a question we need not and do not reach), the failure to give those instructions did not prejudice appellant. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 570.)

B. Claims Involving Exclusion and Admission of Evidence

Appellant contends the trial court erred in excluding testimony by a Span employee that he saw unauthorized lock pins on lift trucks rented from respondent months after the present accident. We are not required to determine whether this evidence was admissible, either as evidence of custom and practice or as impeachment

² For the same reasons, we reject appellant's contention that the evidence was insufficient to support the jury's determination that respondent's negligence was not a substantial factor in causing harm to appellant.

evidence, because even if the evidence was admissible, its exclusion did not prejudice appellant.

First, respondent's head mechanic admitted at trial that the lock pin on the machine driven by appellant was not the original equipment self-locking pin and was not a manufacturer-approved substitute. Second, the only issue about which the excluded evidence was relevant was the issue of respondent's negligence. That issue was resolved by the jury in appellant's favor. In essence, as discussed in the previous section, the answers on the special verdict form show the jury accepted as true that respondent installed the wrong pin and that it was negligent in doing so. The excluded evidence was not probative of the causation issue and could not have resulted in a causation determination that was more favorable to appellant. Accordingly, exclusion of the evidence did not prejudice appellant. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 570.)

Appellant contends the court erred in preventing his attorney from cross-examining respondent's owner about California administrative regulations restricting the use of substitute parts on industrial trucks such as the lift involved in this case. As with evidence concerning subsequent use of the nonconforming lock pin, the regulations in question were relevant only to the issue of respondent's negligence. Because that issue was resolved by the jury in appellant's favor, any limitation on cross-examination intended to further establish that negligence was not prejudicial; that is, such cross-examination could not have contributed to a verdict more favorable to appellant. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 815; Evid. Code, § 354.)

Appellant contends the trial court should have excluded or significantly limited the testimony of Dr. Harvey L. Edmonds, respondent's expert retained to conduct a medical examination of appellant. (See Code Civ. Proc., § 2032.220 et seq.) Appellant contends the medical examination exceeded statutory limits on the scope and nature of

such an examination. He also contends Edmonds should not have been permitted to express an opinion on the cost of medical care reasonably necessary as a result of appellant's injury.³ Again, however, in light of the verdict such evidence could not have been prejudicial: Edmonds's testimony addressed only the extent and duration of appellant's injury and did not pertain in any way to the issue of whether respondent's negligence was a cause of that injury. While the evidence was pertinent to the issue of appellant's credibility, the jury's causation verdict did not implicate that credibility. Accordingly, exclusion of the evidence could not have contributed to a verdict more favorable to appellant. (Evid. Code, § 353.)

Appellant contends the court should have excluded testimony and video evidence from an investigator who observed and filmed appellant engaging in physical activity outside his home. He contends the evidence was not properly disclosed pretrial by respondent's counsel. As with the testimony of Edmonds, however, this evidence only went to the questions of the duration and extent of appellant's injury and the related issue of appellant's credibility in describing the seriousness of the injury. Accordingly, admitting this evidence did not prejudice appellant. (Evid. Code, § 353.)

Finally, appellant contends the court should have excluded from evidence a video and certain photographs presented as part of the testimony of respondent's mechanical engineering expert. In essence, the video and the photographs were intended to show that the type of substitute lock pin used by respondent would not fall out of the quick

³ The parties stipulated to the reasonable cost of the treatment appellant received. Edmonds testified that most of the care was unnecessary and placed a monetary value on the necessary care based on the individual cost elements in that stipulation. Although appellant objects to Edmonds's use of the word "outliers" to describe the medication practices of one of appellant's treating physicians, that testimony related only to the extent of appellant's injury and the reasonable necessity for treatment, issues the jury never reached.

release pin when the lift was operated. Appellant contends the circumstances depicted were not substantially similar to the conditions on the day of appellant's injury.

Appellant moved in limine to exclude these items, in part because they were turned over late to counsel and in part because the conditions were insufficiently similar. The court granted appellant's counsel additional time to review the materials and expressly reserved ruling on the similarity issue. Without seeking any further ruling on the similarity issue, appellant introduced the video and photographs as part of his examination of his own mechanical engineer expert during his case-in-chief. When the items were again shown during the defense case, appellant's counsel did not object to the evidence.

Appellant impliedly acknowledges that the issue of admissibility of evidence generally is not preserved for appellate review unless the party opposing the evidence objects in the trial court and obtains a ruling by the trial court. (See Evid. Code, § 353, subd. (a); *People v. Brown* (2003 31 Cal.4th 518, 546-547.) He contends, however, that "if the objector uses the evidence defensively to explain or contradict the other party's use of it, the objection is not waived," citing *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 299-300, footnote 17.

The "defensive use" exception is not applicable in the present case. In *Warner Constr. Corp. v. City of Los Angeles*, *supra*, 2 Cal.3d at pages 299-300, footnote 17, the court made clear that the plaintiff objected to the evidence in question, that the objection was overruled, and that the plaintiff then proceeded to use the evidence. Under those circumstances, the court held that the objection to the evidence was not waived on appeal by plaintiff's subsequent use of the evidence. In the present case, appellant skipped the crucial step identified by the Supreme Court in *Warner*: appellant did not object to the evidence and then proceed in accordance with the court's ruling on the objection. Here, the court expressly deferred ruling on the motion to exclude the

evidence and appellant still went forward with the use of the evidence as part of his own case-in-chief. The objection to the admissibility of the evidence was waived.

C. Denial of Appellant's Motion for Mistrial

Appellant contends his attorney made three motions for mistrial. He contends the court erred in denying the motions. In two of the instances identified on appeal, there was no motion for mistrial. As to the third instance, we conclude the court did not abuse its discretion in denying the motion.

The first instance arose during the testimony of respondent's mechanical engineer expert, Paul Guthorn. After appellant's counsel had vigorously questioned Guthorn about his conclusion that the attachment could not fall off even if the quick switch pin was only partially inserted into the attachment flange, respondent's counsel asked Guthorn on redirect whether Guthorn, if appellant's counsel was "interested, could you supply him with a video showing the impossibility of what you've just testified to?" Guthorn said he could. Appellant's counsel then objected to "that" as "inappropriate" since "we've already done discovery." Counsel added, "I move to strike that." The court stated that the "[o]bjection's noted."

The trial was recessed for the day. The next day of trial, appellant's counsel raised the issue again, saying that, upon further consideration, he believed the court should admonish the jury to disregard counsel's offer of an additional video. Counsel did not move for a mistrial. The court did, however, grant the only motion counsel made (that is, for an admonition): the court admonished the jury to "disregard" the "discussion at the end of the day about offering a tape of Paul Guthorn if counsel needed it." The court instructed the jury to "consider only the evidence that's before the Court." Thus, there was no motion for mistrial on this occasion.

The second incident occurred after respondent's counsel displayed a portion of appellant's deposition transcript. An unobjectionable portion of the deposition was marked with a highlighter, but another portion of the page contained testimony

concerning appellant's receipt of unemployment compensation. The latter information had been excluded by an in limine order. The page was removed from the display after approximately 30 seconds.

The next day, appellant's counsel brought the matter to the court's attention, calling opposing counsel's actions "inappropriate" and "deliberate." There was no request to admonish the jury. There was no motion for mistrial.

The third incident involved an allegation that the wife of respondent's counsel, Barbara Sharton, sitting in the audience, "shouted" aloud during cross-examination of respondent's investigator, "that would be malpractice." Appellant's counsel did not object to the comment or request an admonition at the time it occurred, although he later stated he heard the comment. Instead, the next day of trial, counsel told the court he had been informed by his own wife (who also was in the audience) that the comment had been made by Sharton. Counsel said he surmised the jury had heard the comment since counsel himself had heard it while standing close to the jury box. Counsel did not describe any manner in which the comment, if heard by the jury, prejudiced appellant. In fact, when specifically asked by the court whether the comment was prejudicial, counsel replied, "I don't know. I have no idea. ... I don't know how they interpret it."⁴

Although it was disputed that the comment was made in the presence of the jury, the court assumed it was and assumed the jury heard the comment. However, the court concluded the comment would have "minimal effect" and was best handled by not bringing the jury's attention to it by questioning the jury or admonishing the members to ignore the comment. Noting that there had been numerous "comments going back and

⁴ There is no indication in the record when the comment was made. Although Sharton admitted making the comment, she said it was out of the presence of the jury. Both sides apparently agree the comment was made in response to questions to the investigator about whether appellant and his attorney had been notified that appellant was under surveillance.

forth” between counsel throughout the trial, the present comment “I think has no effect on the outcome of the case.” The court denied appellant’s motion for mistrial.

On appeal, appellant has not articulated a theory of prejudice. Instead, he seems to assert a per se standard: “For an attorney to speak out loud enough while counsel is questioning a witness, while he is standing near the jury box and hears the comment, requires this Court to reverse and grant a new trial.” That is not the law. We are required to determine whether the trial court abused its discretion in denying the mistrial motion and, if so, whether that abuse of discretion prejudiced appellant. (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 167, p. 204.)

We conclude the court did not abuse its discretion in determining that Sharton’s comment could not reasonably be viewed as having an adverse effect on plaintiff’s case.

D. Claims Based on Court’s Conduct of the Trial

Appellant broadly contends, as stated in his reply brief, “appellant was denied due process by the court’s failure to properly rule on objections, control the misconduct of trial counsel, Daniel Lyons, and [failure] to adequately rule on other evidentiary objections.” (Capitalization omitted.) In neither his opening brief nor his reply brief does appellant set forth argument or citation of authority concerning his claim of a “due process” violation under either the state or federal Constitution. Accordingly, we deem that contention waived. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)

In a very general way in his opening brief, and in a more specific manner in the reply brief, appellant discusses 49 separate instances in which appellant contends the trial court took or failed to take action when confronted with objections by appellant or claimed misconduct by respondent’s trial counsel. Appellant does not contend any single claimed error was prejudicial and the basis for reversal. He does, however, contend the overall effect of these incidents was prejudicial: “How can a person have a fair trial when he is treated as he was by the Respondent’s attorney, Daniel P. Lyons, and where the court refused to stand up to the outrageous conduct of Mr. Lyons, and

further, the court in essence, turned the courtroom over to Mr. Lyons and told the jurors that they were the judges of facts in the case, regardless of whether Mr. Lyons misstated, misspoke, whether it was intentional, negligent, or done to the prejudice of Appellant. Such conduct, when coupled with the way Respondent was allowed to act in this case, ... completely destroyed Appellant's ability to have a fair trial." It is, apparently, in this sense that appellant uses the phrase "due process," that is, as the generalized right to a fair trial.

We address initially appellant's several specific claims involving his objection to questions as "misstating" or "mischaracterizing" the evidence. The following example is typical of this category of the claim on appeal. On cross-examination of Keith Harris, the Span executive who handled the investigation of on-the-job accidents, respondent's counsel questioned him about Span's programs for training its employees to safely operate machinery. Harris testified he had not recently been involved in the details of employee training and that he had no personal knowledge whether appellant did a daily pre-use inspection of the forks and the attachments on the lift assigned to him for operation. Respondent's counsel then said: "So if I told you that [appellant] testified in his deposition that he didn't do that, that he didn't do it on the day of the accident, and that he frankly just didn't do it routinely at all, that would be a violation of Span's training policies as you understand Span trains its forklift operators. Is that true?" Appellant's counsel intervened: "Going to object. Misstates the evidence." The court responded: "Okay. Objection's noted. You can handle on redirect." Harris then answered: "If that's what he said in his deposition, yes, it is a violation."

There is an underlying problem with the question to Harris, and it pervades many of the questions posed by respondent's counsel throughout the case: The narrative

portion preceding the actual question makes the question and answer irrelevant.⁵ That is, appellant's testimony in his deposition, whatever it was, was not "a violation of Span's training policies." What appellant actually did at the job site was either in accord with the policies or not, regardless what appellant said at his deposition. If respondent sought the witness's evaluation of particular action by an employee, counsel should have asked a hypothetical question with the actions, not the testimony, as the predicate. That, however, was not appellant's objection to respondent's question.

Appellant's reply brief explains the basis for the trial objection: "Mr. Brewer's testimony was consistent as to the type of inspection he would undertake. Mr. Brewer testified that he was never provided any ASME [American Society of Mechanical Engineers] regulations, Cal-OSHA [California Occupational Safety and Health Act] regulation, or any other federal regulations, dealing with the operation of the machine. His daily practice was to start the machine, once it was warmed up to check to see if there were any hydraulic leaks or oil leaks, or any other type of leaks from the machine; to walk around the machine looking for leaks, and check the tires." (Record citations omitted.)

There are several problems with appellant's argument, which we will discuss briefly, but the net result is that the trial court did not abuse its discretion in declining to rule on the objection. The first problem is that appellant's brief relies on appellant's own testimony many days later in the trial to establish "the evidence" that respondent's counsel allegedly misstated. There was no proffer in the trial court, and no record citation in this court, as to appellant's actual testimony in his deposition. The second problem is that appellant's discussion of the matter in his reply brief does not make

⁵ Similarly, respondent's counsel often asked a witness whether the witness knew someone else testified in a particular manner, when the witness's knowledge of the earlier testimony was irrelevant.

clear what he claims is misstated: Is the misstated fact that Span's training required inspection of the forks (appellant claimed he had not been trained in that manner) or that the walk-around inspection was in fact sufficient to constitute an inspection of the "forks and attachments"? The third problem follows from the first two problems: The claim that appellant testified he did not do "the walk-around daily inspection, checking the forks and the attachments," is a reasonable interpretation of appellant's testimony later in the trial, even though a contrary interpretation was arguable as well.

The trial court advised counsel, and told the jury, that it was the practice of the court to simply "note" a "misstates the evidence" objection unless the misstatement was "a completely obvious one." In all other instances, the court stated, it would permit the objecting party to clarify the matter on redirect or recross examination, as the case may be.

We have reviewed all of the instances cited by appellant in which the court did not sustain the objection.⁶ In each case, we conclude the view of the evidence incorporated in the question reflects a reasonable interpretation of or inference from the evidence in the record. As such, the court's refusal to impose its own imprimatur on one view of the evidence, whether by sustaining or denying the objection, constituted a reasonable exercise of the court's power to control the manner of questioning and the introduction of evidence.⁷

⁶ We note that in some instances the court sustained appellant's objection or prohibited the question on an alternative basis. When the court sustains an objection on a valid, alternative basis, e.g., that the question is argumentative or compound, the objecting party is not usually prejudiced by the failure to reject the question on the objector's preferred basis. Appellant suggests no unusual circumstances in the present case.

⁷ Evidence Code section 765, subdivision (a), states: "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."

In other instances cited by appellant, appellant's counsel did not object to the acts of opposing counsel that he now contends the trial court should have "controlled." For example, respondent's counsel showed a witness lock pins from across the courtroom in an effort to demonstrate that the lock pin should have been visible on the day of the accident. Although appellant contends that "[t]his demonstrates what was done in the court without prior notice," he does not contend he objected to the questioning. Where there was no such objection, appellant clearly cannot fault the trial court for failing to rule on an objection.

Similarly, in one case appellant contends a question stated that the witness's medical examination of appellant had occurred just three weeks after the injury. Appellant contends the examination was really six weeks after the injury and that the court should have sustained appellant's objection that the question misstated the evidence. Yet when the cross-examination of the witness concluded immediately after he answered this question, appellant's counsel did not clarify the matter through redirect examination. In light of that failure, the court's failure to sustain the objection is not prejudicial.

Appellant's final contention concerning the trial court's failure to control the proceedings involves the overruling of an "asked and answered" objection. Appellant does not identify any prejudice arising from this repetitive questioning. We conclude the matter does not rise to the level of reversible error.

E. Claims that Respondent's Counsel Committed Misconduct

Misconduct by a trial attorney can take many forms, including "[p]ersonal attacks on the character or motives" of the adverse party and his attorney, appeals to juror sympathy or prejudice, reference to inadmissible evidence or matters not in evidence, and other forms of unfair or unprofessional conduct. (See generally 7 Witkin, Cal. Procedure, *supra*, Trial, §§ 214-225, pp. 257-275.) Appellant contends

respondent's counsel committed such misconduct at every phase of the trial from voir dire to closing argument, and that the misconduct deprived appellant of a fair trial.

Normally, in order to obtain appellate review of attorney misconduct, the opposing party must object to the misconduct in each instance and also request the court to admonish counsel and give the jury a curative admonition. (See *Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610-611 (*Horn*).) In the rare case, misconduct is so pervasive -- or the trial court so consistently denies objections to it -- that an appellate court will reverse a judgment even though there has been no objection to some of the misconduct. (See 7 Witkin, Cal. Procedure, *supra*, Trial, § 213, p. 257.) In other cases, even pervasive misconduct has not resulted in reversal because the appellate court perceives the opposing party has made a tactical decision to permit the misconduct. (*Horn, supra*, at p. 611.)

Appellant contends respondent's counsel committed misconduct during voir dire of the jury when he "repeatedly" "told the jury about many personal matters that were irrelevant and were done solely for the purpose of seeking sympathy from the jury, were unduly prejudicial and caused irreparable harm" to appellant. Appellant does not cite to or discuss any such instance, nor does he cite to any objections he made to counsel's conduct. Our own review of the voir dire transcript does not reveal that appellant's counsel made any objections to opposing counsel's actions during voir dire. As such, the issue was not preserved for appeal. (*Horn, supra*, 61 Cal.2d at p. 611.) In any event, the attorneys for both parties made normal attempts to establish rapport with the prospective jurors; there was nothing egregious in either counsel's conduct.

Appellant contends respondent's counsel committed misconduct in his opening statement to the jury. He says counsel relied on facts that would not be put in evidence (that his brother was an emergency room doctor), told the jury his personal feelings about the case (he was glad appellant was not injured too badly), and argued the case instead of merely describing the evidence to be presented. Again, appellant does not

refer us to any objections made during respondent's opening statement to the jury and our own review of the record does not disclose any such objections. Further, while there are some instances in which an objection to counsel's presentation may well have been sustained, there is nothing in respondent's opening statement to the jury that was irredeemably prejudicial or that could not have been cured by timely admonition. Accordingly, the issue of misconduct in the opening statement was not preserved for appeal. (*Horn, supra*, 61 Cal.2d at p. 611.)

Appellant contends respondent's counsel engaged in misconduct during the evidentiary portions of the trial. In his opening brief, he cites only limited instances of alleged misconduct, fails to refer us to any objection and request for admonition concerning such conduct, and fails to provide a reasoned analysis of his claim. Accordingly, the misconduct argument, as it relates to the evidentiary portion of the trial, is waived.⁸ (*Horn, supra*, 61 Cal.2d at p. 610.) In his reply brief, appellant still does not make any specific arguments concerning the evidentiary portion of the trial. Instead he invites us to "examine all the objections set forth in the AOB and this Reply Brief, and also the ones made during trial. Appellant has not provided all of the objections that were overruled, or the misstatements and inadequate applications of law done by the court. It is clear that [the court] ... turned the courtroom over to Respondent's lawyer." We decline appellant's invitation. In the absence of reasoned argument addressed to the specific facts of this case, the appellate claim is waived. (*People v. Dougherty, supra*, 138 Cal.App.3d at p. 282.)

⁸ By a page reference to an earlier portion of his opening brief appellant incorporates a complaint that respondent's counsel repeatedly accused appellant during cross-examination of "making up excuses" for appellant's own conduct at the job site. He also says respondent's counsel on one occasion accused an expert of being "an excuse machine for Appellant." In all instances cited by appellant, there was either no objection or the objection was sustained. In no instance did appellant request an admonition to counsel or a curative instruction to the jury.

To the extent appellant is attempting to rely on actions of counsel enumerated in the section of his reply brief addressed to the court's failure to rule on appellant's objections to the conduct of respondent's counsel (see section D, *ante*), our review of the cited instances reveals that in most cases the court ruled on the objection in a manner favorable to appellant. In other instances, as we have noted above, appellant did not object to counsel's conduct and did not request admonition of counsel or the jury. Finally, many of the questions to which appellant did object incorporated an arguably correct interpretation of the evidence that could not be characterized as an intentional misstatement. As a result, we conclude appellant has failed to establish prejudicial misconduct of respondent's counsel during the evidentiary portion of the trial.

Appellant also contends respondent's counsel engaged in misconduct during closing argument to the jury. He contends respondent's counsel suggested to jurors that they should be guided by the judgment or verdict in some other case, that he appealed to the passion or prejudice of the jurors by referring to his client as a "little family corporation," and that he vilified appellant and his attorney. None of these claims are supported by citations to the record (in either the opening or reply brief); there is no claim appellant objected at any point during closing argument; and there is no reasoned discussion of appellant's claims.

We have reviewed respondent's closing statement to the jury. During the entire closing, which ran to nearly 100 pages of reporter's transcript, appellant objected only five times. None of those objections addressed the types of conduct claimed on appeal to be misconduct. None of the objections were on the basis of misconduct. All of the objections were to routine statements of counsel -- arguably erroneous statements of the law or the facts -- but not outrageous or intentional misstatements constituting misconduct. (In two of the five instances, the court sustained the objection.) Appellant

has not established prejudicial misconduct of respondent's counsel during his closing argument to the jury.

Disposition

The judgment is affirmed. Respondent is awarded costs on appeal.

VARTABEDIAN, J.

WE CONCUR:

ARDAIZ, P. J.

LEVY, J.